CasePrepPlus

May 4, 2018

An advance sheet service summarizing recent and significant New York appellate cases

Editor: **Bruce Freeman**

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COURT OF APPEALS

CONTRACT LAW, CIVIL PROCEDURE.

A GENERIC NEW YORK CHOICE OF LAW PROVISION IN A CONTRACT DOES NOT TRANSFORM ALL NEW YORK STATUTORY REQUIREMENTS INTO CONTRACTUAL OBLIGATIONS, HERE THE CONSTRUCTION MANAGEMENT CONTRACT DID NOT MENTION BOND REQUIREMENTS UNDER THE LIEN LAW AND THE CHOICE OF LAW PROVISION COULD NOT BE USED TO READ THE LIEN LAW REQUIREMENT INTO THE CONTRACT.

The Court of Appeals, affirming the Appellate Division, determined that the clause of a contract indicating construction of the contract was governed by New York law did not incorporate a specific statutory requirement, here a requirement of the Lien Law: "Plaintiff's complaint does not identify which, if any, provision or provisions of the [CM agreement] were purportedly breached. Unlike the Development and Lease Agreements — to which plaintiff is not a party — the CM Agreement contains no express provision requiring compliance with the Lien Law. Plaintiff nevertheless maintains that section 5 of the Lien Law should be "read into" the CM Agreement because the contract is governed by New York law. Specifically, plaintiff points to section 17.3 of the CM Agreement, which provides that "[t]he construction, validity and performance of [the CM Agreement] shall be exclusively governed by the laws of the State of New York, excluding any provisions or principles thereof which would require the application of the laws of a different jurisdiction. 'However, this is a typical choice-of-law provision that we do not read as imposing a contractual obligation here. The mere fact that an agreement, and disputes arising thereunder, are governed by the law of a particular jurisdiction does not transform all statutory requirements that may otherwise be imposed under that body of law into contractual obligations, and we decline to interpret the CM Agreement as 'impliedly stating something which [the parties] have neglected to specifically include' ...". ***Skanska USA Bldg. Inc. v. Atlantic Yards B2 Owner, LLC*, 2018 N.Y. Slip Op. 02828, CtApp 4-26-18**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

ALLEGATIONS OF SEX OFFENSES OF WHICH DEFENDANT WAS ACQUITTED AT TRIAL PROPERLY USED IN THE SORA RISK ASSESSMENT CALCULATION.

The Court of Appeals, over an extensive dissenting opinion by Judge Rivera, affirmed the SORA court's use of allegations of sex offenses of which defendant was acquitted at trial in its risk assessment calculation: "The record supports the affirmed finding that defendant engaged in sexual intercourse, deviate sexual intercourse, or aggravated sexual abuse, warranting the imposition of 25 points under risk factor 2 in determining defendant's risk level under the Sex Offender Registration Act. Contrary to defendant's argument, his acquittal of charges at his criminal trial relating to such conduct, does not foreclose the hearing court from finding, by clear and convincing evidence, that he engaged in such acts ... . **From the dissent:** As this Court has recognized, the clear and convincing evidence standard is an exacting one ... . '[T]he registration duties that SORA imposes are a nontrivial restriction on the individual's liberty, and there is a material difference between having to register for ten years and having to register for life'... . In a case such as this, where the jury clearly had grave doubts about [the complainant's] narrative, the courts below erred in concluding that her testimony was clear and convincing evidence of defendant having committed the sexual conduct necessary for an assessment of 25 points under risk factor two." ***People v. Britton*, 2018 N.Y. Slip Op. 02830, Ct App, 4-25-18**

LANDLORD-TENANT.

THE 20% VACANCY INCREASE SHOULD BE INCLUDED WHEN CALCULATING THE LEGAL REGULATED RENT TO DETERMINE WHETHER AN APARTMENT HAS REACHED THE $2000 THRESHOLD IN THE RENT STABILIZATION LAW.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, reversing the Appellate Division, determined "the 20% vacancy increase should be included when calculating the legal regulated rent for purposes of determining whether the subject apartment has reached the $2,000 deregulation threshold in the Rent Stabilization Law. … In November 2003, plaintiff Richard Altman entered into a sublease with Keno Rider, who had been the tenant of the subject apartment since 1993. Rider had a rent-stabilized lease with the prior landlord at a legal regulated rent of $1,829.49 per month. In December 2004, the prior landlord commenced a nonpayment proceeding against Altman and Rider. In March 2005, Altman and the prior

landlord entered into a stipulation of settlement, under which the parties agreed that Rider would surrender all rights to the apartment and the landlord would deliver a new lease to Altman. Along with the new lease, Altman executed a 'Deregulation Rider for First Unregulated Tenant.' The Deregulation Rider stated that the apartment was not rent-stabilized 'because the legal rent was or became $2000 or more on vacancy' after the statutory vacancy increase was added to the last regulated rent. In August 2005, the landlord removed the apartment from registration with the Division of Housing and Community Renewal (DHCR), based on 'high rent vacancy.' * * * ... [T]he 20% increase should have been considered in determining the legal regulated rent at the time of the vacancy and, as a result, the subject apartment was properly deregulated in 2005." ***Altman v. 285 W. Fourth LLC*, 2018 N.Y. Slip Op. 02829. CtApp 4-26-18**

FIRST DEPARTMENT

CIVIL PROCEDURE.

PARTIES HAD CONSENTED TO PROCEDURES WHICH DEVIATED FROM THE CPLR, SUMMARY JUDGMENT MOTIONS, ALTHOUGH UNTIMELY UNDER THE CPLR, SHOULD HAVE BEEN DEEMED TIMELY.

The First Department, reversing Supreme Court, noted that the parties, through stipulations, had consented to procedures which deviated from the CPLR. Therefore the summary judgment motions, although untimely under the CPLR, should have been deemed timely: "Prior court orders and stipulations between the parties show that the parties, with the court's consent, charted a procedural course that deviated from the path established by the CPLR and allowed for defendants' filing of this round of summary judgment motions more than 120 days after the filing of the note of issue ... . Thus, the motions were timely, and we remand the matter to the motion court for a full consideration of their merits ...". ***Reeps v. BMW of N. Am., LLC*, 2018 N.Y. Slip Op. 02907, First Dept 4-26-18**

CIVIL PROCEDURE, FRAUD.

ALTHOUGH THE DEFENDANT DIRECTORS ON THE BOARD OF GEROVA DID NOT RESIDE OR DO BUSINESS IN NEW YORK, OTHER GEROVA DEFENDANTS PARTICIPATED IN THE FRAUDULENT SCHEME IN NEW YORK, THEREBY PROVIDING A SUFFICIENT BASIS FOR LONG-ARM JURISDICTION.

The First Department, in a memorandum decision that does not lay out the facts, determined that, although the defendant directors on the board of Gerova did not reside or do business in New York, other Gerova defendants participated in the fraudulent scheme in New York thereby providing a sufficient basis for long-arm jurisdiction (the decision doesn't indicate what "Gerova" is): "The Supreme Court properly concluded that defendants are subject to jurisdiction under New York's long-arm statute because they were part of a conspiracy that involved the commission of tortious acts in New York (CPLR 302[a][2]...). Defendants were directors on Gerova's board during most of the time when Gerova was involved in a fraudulent scheme. The amended complaint details the conspiracy to commit fraud using Gerova, the agreements ... to loot Wimbledon (plaintiff), and Wimbledon's resulting insolvency ... . Although defendants did not reside or do business in New York, other Gerova defendants were in New York or interacted regularly with New York, including one of the masterminds of the fraudulent scheme ... . Regarding their overt acts in furtherance of the conspiracy, defendants' approval of a Gerova proxy statement on which they are listed and which seeks approval of the sham acquisition of a reinsurance company, their receipt of "hush money" to ignore certain red flags at Gerova, and their failure to correct misrepresentations or disclose material information to the public sufficed at this stage. Although defendants did not mastermind the conspiracy, their receipt of 'hush money' allows the reasonable inference that they exerted 'control' to the extent that the fraud could not have been accomplished without their acquiescence to the proxy and other misconduct ...". ***Wimbledon Fin. Master Fund, Ltd. v. Weston Capital Mgt. LLC*, 2018 N.Y. Slip Op. 02903, First Dept 4-26-18**

CONDOMINIUMS, CONTRACT LAW.

PLAINTIFF, PURSUANT TO THE CONDOMINIUM DECLARATION AND OFFERING PLAN, WAS THE OWNER OF THE BASEMENT SPACE USED BY DEFENDANTS, PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON ITS TRESPASS ACTION, BECAUSE THE DECLARATION AND OFFERING PLAN, AND THE REFERENCE TO IT IN THE DEEDS, WERE UNAMBIGUOUS, PAROL AGREEMENTS TRANSFERRING OWNERSHIP OF THE AREA TO DEFENDANTS WERE NOT ENFORCEABLE.

The First Department determined plaintiff was entitled to summary judgment on its trespass action against defendant condominium owners based on defendants' use of a basement storage area which, according to the Declaration and Offering Plan, was owned by plaintiff. Any attempt to transfer ownership of the basement area to defendants' condominium was ineffectual because there was never a meeting and vote by unit members: "The Declaration and Offering Plan are unambiguous and clearly state that the disputed basement space was a Limited Common Element of the front unit owned by plaintiff. The deeds to both parties' units were silent on this issue, but provided that each buyer agreed that their ownership was subject to the Declaration. Paragraph Fifth of the Declaration provided that the use of the basement space was deemed conveyed with the conveyance of the front unit, even if the interest was not expressly described in the conveyance. In or-

der to amend the Declaration, pursuant to paragraph Tenth(b), the board was required to execute an instrument upon the affirmative vote of 80% of the unit owners held at a duly called meeting. Moreover, paragraph Tenth(b)(I) provided that an amendment which altered the right to portions of the common elements required the consent of 100% of the affected unit owners. Here, there was never a duly held meeting of the unit owners at which 80% voted to amend the Declaration to permit transfer of the right to use the basement space from the front unit to the rear unit. Thus, plaintiff retained the right to use the basement space. Parol evidence of the parties' contrary intent is irrelevant in the face of the unambiguous governing documents ... . Plaintiff's acknowledgment in the contract of sale that it was not purchasing the right to use the basement storage space is not controlling because the deed contained a provision that the sale was subject to the provisions of the Declaration, which stated that the storage space was for the use of the front unit." ***P360 Spaces LLC v. Orlando*, 2018 N.Y. Slip Op. 02749, First Dept 4-27-18**

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL TOOK A POSITION ADVERSE TO HER CLIENT'S RE THE CLIENT'S PRO SE MOTION TO WITHDRAW HIS PLEA, MATTER REMITTED FOR FURTHER PROCEEDINGS ON THE MOTION WITH NEW COUNSEL.

The First Department determined defense counsel took a position adverse to her client's on the client's pro se written motion to withdraw his plea. Therefore the matter was remitted for further proceedings on the motion with new counsel: "Before sentencing, defendant made a written pro se motion to withdraw his guilty plea, asserting that his plea was involuntary because he 'was not fully aware of the circumstances involved,' and that he had a meritorious defense. In a companion motion, he cited specific inconsistencies in the victim's statements. Defendant did not claim there were any deficiencies in defense counsel's performance. However, when asked by the court whether she had anything to say 'on behalf of the motion,' counsel replied, 'I don't think that there . . . is a basis for it,' and that defendant had not wanted to proceed to trial. This constituted taking a position adverse to defendant's, and thus warranted assignment of new counsel... . To the extent that, after the court denied the motion, counsel made additional comments that appeared to bear on her advice to defendant about taking the plea, these were unnecessary because, in his plea withdrawal motion, defendant never complained about his attorney's conduct. Thus, counsel's comments were adverse to her client's position, and 'went beyond a mere explanation of h[er] performance' ...". ***People v. Colson*, 2018 N.Y. Slip Op. 02885, First Dept 4-26-18**

CRIMINAL LAW, EVIDENCE.

DRUG FACTORY JURY INSTRUCTION NOT SUPPORTED BY THE EVIDENCE, NEW TRIAL ORDERED.

The First Department, reversing defendant's conviction, determined the evidence was not sufficient to support the "drug factory" jury instruction: "The court's jury instruction on the drug factory presumption of Penal Law § 220.25(2) was improper. The statutory presumption 'does not require that mixing or compounding paraphernalia be found on the premises' ... . However, where, as here, the quantity of drugs found does not show 'circumstances evincing an intent to unlawfully mix, compound, package, or otherwise prepare for sale' ... , giving the drug factory charge is unwarranted. Here, the officers recovered approximately one gram of crack cocaine divided between 26 'twists.' The fact that a larger bag contained individual twists was not a sufficient basis for the trial court to employ the drug factory presumption ... . The presence of an unspecified, untested, white residue on a kitchen counter does not justify the charge, where such is equally consistent with the residue left by household cooking and cleaning products." ***People v. Johnson*, 2018 N.Y. Slip Op. 02879, First Dept 4-26-18**

DEFAMATION.

CHARACTER IN A MOVIE BASED UPON A SHORT STORY WAS IDENTIFIABLE AS PLAINTIFF, THE COMPLAINT STATED CAUSES OF ACTION FOR DEFAMATION AGAINST THE MAKERS OF THE MOVIE.

The First Department determined the complaint by plaintiff, the ex-husband of the writer, Katha Pollitt, stated causes of action for defamation and the movie defendants' motion to dismiss was properly granted. The short story, written by Katha Pollitt, on which defendants' movie was based, referred to Pollitt's lover as a philanderer and womanizer, but described Pollitt's ex-husband (plaintiff) as someone with whom Pollitt got on very well and an excellent father. Plaintiff alleged the references in the movie to the main character's ex-husband as an adulterer and philanderer were defamatory because the main character was identifiable as Katha Pollitt and plaintiff was Pollitt's only ex-husband: "Plaintiff sufficiently pleads that defamatory statements made about Wendy's ex-husband, in the trailer, are 'of and concerning' him ... . The trailer, which proclaims itself to be 'Based on a True Story,' is based upon, and shares a title with the article, linking the main character, Wendy, to Ms. Pollitt, and by extension, Wendy's ex-husband Ted to plaintiff. Wendy and Pollitt are middle-aged, female writers learning to drive in Manhattan, who formerly relied on an ex-husband to drive them and have a daughter. As relates to the story, plaintiff's salient characteristic is that he is the only ex-husband of the article's author, which distinctive trait links him indelibly to Ted, the only former spouse depicted in the trailer ... . At this early stage of the litigation, defendants failed to establish that plaintiff was a public figure or that this was a matter of public concern, to which the 'actual malice' standard applies... , or that the subject matter of the trailer is within the sphere of legitimate public concern ...". ***Cohen v. Broad Green Pictures LLC*, 2018 N.Y. Slip Op. 02757, First Dept 4-24-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF, WHO FELL FROM AN UNSECURED LADDER, WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CLAIM, THERE WAS A QUESTION OF FACT ON THE LABOR LAW § 241(6) CAUSE OF ACTION WHICH ALLEGED THE LADDER SLIPPED ON A WET FLOOR.

The First Department, reversing Supreme Court, determined plaintiff, who fell from an unsecured ladder, was entitled to summary judgment on his Labor Law § 240(1) claim. The court further found there was an issue of fact on plaintiff's Labor law § 241(6) claim because of evidence the ladder slipped on a wet floor: "Plaintiff established prima facie a violation of Labor Law § 240(1) through his testimony that he was caused to fall when the unsecured ladder on which he was standing suddenly slipped out from under him ... . In opposition, defendant failed to raise an issue of fact as to whether plaintiff was the sole proximate cause of the accident. There is no evidence in the record that there were other readily available safety devices that would have been adequate for plaintiff's work ... . In addition, defendant's expert's opinion that the accident was caused by plaintiff's misuse of the ladder was entirely speculative, since it was based on his visit to the accident site almost two years after the accident occurred ... . Defendant also failed to show that plaintiff disregarded specific instructions not to use the ladder or do the work he was performing at the time of the accident ... . Plaintiff's coworker's deposition testimony establishes that plaintiff was not given any such instructions before he ascended the ladder. The coworker's subsequent affidavit, which conflicts with his deposition testimony on this issue, creates only a feigned issue of fact ... . Summary dismissal of the Labor Law § 241(6) claim predicated on an alleged violation of Industrial Code (12 NYCRR) § 23-1.21(b)(4)(ii) is precluded by an issue of fact as to whether the accident was caused by a wet condition of the floor at the time that the ladder slipped out from underneath plaintiff ...". ***Tuzzolino v. Consolidated Edison Co. of N.Y.*, 2018 N.Y. Slip Op. 02755, First Dept 4-24-18**

LABOR LAW-CONSTRUCTION LAW, EMPLOYMENT LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER PLAINTIFF WAS ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN HE CLIMBED THE LADDER FROM WHICH HE FELL, THUS PLACING THE INCIDENT OUTSIDE THE PROTECTION OF LABOR LAW § 240(1).

The First Department determined that there was a question of fact whether plaintiff was acting within the scope of his employment when he climbed a ladder to troubleshoot a cable installation problem: "Plaintiff commenced this action to recover for personal injuries he allegedly sustained when he fell from a utility pole while attempting to troubleshoot a cable installation activation that did not work. However, his supervisor submitted an affidavit asserting, inter alia, that plaintiff's sole job functions were as a manager, providing administrative services and training, assessing materials and equipment needed for a job, and occasionally following up with an activation from ground level only, but that in no event were his duties to entail climbing any poles. Supreme Court correctly determined that issues of fact exist as to whether the aerial work plaintiff contends he was performing when he fell was outside the scope of his employment and thus outside the protection of Labor Law § 240(1) ...". ***McCue v. Cablevision Sys. Corp.*, 2018 N.Y. Slip Op. 02902, First Dept 4-26-18**

MUNICIPAL LAW, PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

INCIDENT REPORTS DID NOT PROVIDE THE CITY WITH NOTICE OF THE ESSENTIAL FACTS OF PLAINTIFF'S NEGLIGENCE AND LABOR LAW CLAIMS, PETITION TO FILE A LATE NOTICE OF CLAIM PROPERLY DENIED.

The Second Department determined the incident reports concerning plaintiff's injury when he was struck by a chain link fence he was installing did not provide the city with notice of the essential elements of his negligence and Labor Law claims. Therefore the petition for leave to file a late notice of claim was properly denied: "... [T]he incident reports ... were insufficient to provide the respondents with actual knowledge of the essential facts underlying the petitioner's claim. These reports merely indicated that the petitioner injured his shoulder when the temporary chain link fence was blown over by the wind or came down on him as he was working on the fence. The reports made no reference to the claims listed in the proposed notice of claim, inter alia, that the respondents were negligent in allowing a dangerous condition to exist, in failing to provide protective and safety devices, and in failing to properly secure or hoist the fence, and violated certain sections of the Labor Law and unspecified sections of the Industrial Code ... . Furthermore, the petitioner failed to proffer any excuse for the failure to serve a timely notice of claim ... . Moreover, the petitioner presented no 'evidence or plausible argument' that his delay in serving a notice of claim did not substantially prejudice the respondents in defending on the merits ...". ***Matter of Wilson v. City of New York*, 2018 N.Y. Slip Op. 02794, Second Dept 4-25-18**

PERSONAL INJURY.

TESTIMONY THERE HAD BEEN NO COMPLAINTS ABOUT A HOLE ON THE DEFENDANT CEMETERY GROUNDS DID NOT DEMONSTRATE A LACK OF NOTICE IN THIS SLIP AND FALL CASE, DEFENDANT'S SUMMARY JUDGMENT MOTION PROPERLY DENIED.

The First Department determined defendant's motion for summary judgment in this "stepped in a hole" case was properly denied. The testimony that the defendant cemetery had not received any complaints about a hole and the absence of any evidence of when the area was last inspected did not demonstrate the lack of actual or constructive notice: "Defendant did not establish its entitlement to judgment as a matter of law in this action where plaintiff allegedly injured her ankle when she stepped in a hole on defendant's grounds. The fact that defendant's director testified that he did not receive any complaints about the condition of the grounds prior to the accident does not establish that defendant lacked actual notice of the hole, because the director did not state that he was working on the day of the accident ... . Defendant also failed to demonstrate that it lacked constructive notice of the hole. Its director's testimony that he would inspect the premises when his duties permitted does not establish when the subject location was last checked before the accident ...". ***Savio v. St. Raymond Cemetery*, 2018 N.Y. Slip Op. 02906, First Dept 4-26-18**

PERSONAL INJURY.

QUESTION OF FACT WHETHER OWNERS-OCCUPIERS OF A BUILDING UNDER CONSTRUCTION ARE LIABLE FOR A FALLING OBJECT INJURY TO A SIDEWALK PEDESTRIAN.

The First Department determined there was a question of fact whether the owner of a building could be liable for injury to a sidewalk pedestrian caused by an object that fell from the building (which was under construction): "Plaintiff Joseph Kosakowski was a pedestrian on the sidewalk adjacent to a building owned and occupied by the Broadway defendants, which was undergoing construction, when he was struck by a piece of sheet metal that fell from above. Under the circumstances presented, issues of fact exist as to whether the Broadway defendants can be held liable for plaintiff's injuries based upon the nondelegable duty not to cause harm to those traveling on the nearby public sidewalk ...". ***Kosakowski v. 1372 Broadway Assoc., LLC*, 2018 N.Y. Slip Op. 02753, First Dept 4-24-18**

SECOND DEPARTMENT

ADMINISTRATIVE LAW.

ONE YEAR SUSPENSION OF PETITIONER'S DRIVER'S LICENSE SHOCKED ONE'S SENSE OF FAIRNESS, SUPREME COURT REVERSED, MATTER REMITTED TO THE COMMISSIONER OF MOTOR VEHICLES FOR IMPOSITION OF A 60 DAY SUSPENSION.

The Second Department, reversing Supreme Court, determined that a one year suspension of petitioner's driver's license shocked one's sense of fairness and remitted the matter to the Commissioner of Motor Vehicles to impose a 60 day suspension (the facts were not described): " 'An administrative penalty must be upheld unless it is so disproportionate to the offense . . . as to be shocking to one's sense of fairness,' thus constituting an abuse of discretion as a matter of law'... . This Court has no discretionary authority or interest of justice jurisdiction to review the penalty imposed in a CPLR article 78 proceeding ... . Here, under the unique facts and circumstances of this particular case, the penalty imposed of a one-year suspension of the petitioner's driver license was so disproportionate to the offense as to be shocking to one's sense of fairness, thus constituting an abuse of discretion as a matter of law ...". ***Matter of Clapp v. Fiala*, 2018 N.Y. Slip Op. 02778, Second Dept 4-25-18**

CIVIL PROCEDURE, ATTORNEYS, EVIDENCE.

FAILURE TO TIMELY FILE A CONSENT TO CHANGE ATTORNEY DID NOT JUSTIFY THE DENIAL OF A MOTION BROUGHT BY THE NEW ATTORNEY, DEFENDANT'S MOTION TO VACATE THE DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED BECAUSE THE PROCESS SERVER WAS UNABLE TO PRODUCE HIS LOG BOOK.

The Second Department, reversing Supreme Court, determined that the failure to file a consent to change attorney form was not a reason to deny the motion brought by new counsel, and the motion to vacate plaintiff's default should have been granted because the process server was not able to produce his log book: "CPLR 321(b)(1) provides that an attorney of record may be changed by filing a consent to change attorney signed by the retiring attorney and the party. Notice must be given to adverse parties. In this case, it appears that at the time the defendant's motion for leave to renew and reargue was made, no consent to change attorney had been filed. A technical failure to comply with CPLR 321(b), however, does not render the acts of the new attorney a nullity ... . In this case, the plaintiff claims no prejudice, and the consent to change attorneys was filed while the motion was still pending ... . Thus, contrary to the plaintiff's contention, the belated compliance with CPLR 321(b) was not a basis to deny the defendant's motion ... . At a hearing on the validity of service of process, the plaintiff bears the burden of proving personal jurisdiction by a preponderance of the evidence ... . The plaintiff failed

to meet that burden. Where a process server has no independent recollection of events, a process server's logbook may be admitted in evidence as a business record ... . Here, however, the logbook was not produced in court or introduced in evidence. Thus, there was no evidence—other than the process server's description of a business record not before the court, which the process server claimed he was unable to locate—to support the claim that service occurred at 7:05 p.m., when the person who allegedly received the papers was present to receive them." ***Sperry Assoc. Fed. Credit Union v. John*, 2018 N.Y. Slip Op. 02823, Second Dept 4-25-18**

CIVIL PROCEDURE, CONTRACT LAW.

CONTRACTUAL AGREEMENT TO A ONE YEAR STATUTE OF LIMITATIONS FOR A BREACH OF CONTRACT ACTION SHOULD NOT HAVE BEEN ENFORCED, PLAINTIFF HAD NO CONTROL OVER WHEN THE DEFENDANT COULD TAKE AN ACTION WHICH BREACHED THE CONTRACT, HERE THE ALLEGED BREACH BY DEFENDANT DIDN'T TAKE PLACE UNTIL AFTER THE LIMITATIONS PERIOD.

The Second Department, reversing Supreme Court, determined that, under the facts, the contractual provision creating a one year statute of limitations for a breach of contract action was not fair and should not have been enforced. It was not the duration of the limitations period that was deemed unfair, rather it was the defendant's lack of control over the actions by the plaintiff which could be deemed to have breached the contract: "There is nothing inherently unreasonable about the one-year period of limitation, to which the parties here freely agreed ... . 'The problem with the limitation period in this case is not its duration, but its accrual date' ... . It is neither fair nor reasonable to require that an action be commenced within one year from the date of the plaintiff's substantial completion of its work on the project, while imposing a condition precedent to the action that was not within the plaintiff's control and which was not met within the limitations period. 'A limitation period' that expires before suit can be brought is not really a limitation period at all, but simply a nullification of the claim' ... . The limitation period in the subcontract conflicts with the conditions precedent to payment becoming due to the plaintiff, which, under the circumstances of this case, acted to nullify any claim the plaintiff might have for breach of the subcontract. Therefore, interpreting the subcontract against the defendant, which drafted the agreement ... , we find that the one-year limitation period is unenforceable under the circumstances here ...". ***D&S Restoration, Inc. v. Wenger Constr. Co., Inc.*, 2018 N.Y. Slip Op. 02768, Second Dept 4-25-18**

CIVIL PROCEDURE, EVIDENCE.

AFFIDAVIT ALLEGING DEFENDANT MOVED ITS OFFICE AND FAILED TO INFORM THE SECRETARY OF STATE (AND THEREFORE DID NOT RECEIVE THE SUMMONS) WAS DEEMED INSUFFICIENT TO ALLOW IT TO DEFEND AN ACTION PURSUANT TO CPLR 317, SUPREME COURT REVERSED.

The Second Department, reversing Supreme Court, determined the defendant's motion to defend an action pursuant to CPLR 317 should not have been granted. The affidavit alleging defendant moved its office and failed to notify the secretary of state of the move (and therefore did not receive the summons) was deemed insufficient: "CPLR 317 provides that a person served with a summons, other than by personal delivery to him or her, who does not appear, may be allowed to defend the action within one year after he or she obtains knowledge of entry of the judgment upon a finding of the court that he or she did not personally receive notice of the summons in time to defend and has a potentially meritorious defense ... . 'The mere denial of receipt of the summons and complaint is not sufficient to establish lack of actual notice of the action in time to defend for the purpose of CPLR 317' ... . Here, the defendant Grand Slam Ventures, LLC (hereinafter Grand Slam), failed to establish that it did not personally receive notice of the summons in time to defend the action. The affidavit of Grand Slam's managing member averring that Grand Slam moved its office to an unspecified address in 2010, five years before the action was commenced, and failed to update its address on file with the Secretary of State, was not sufficiently detailed or substantiated to establish lack of actual notice of the action ...". ***Moran v. Grand Slam Ventures, LLC*, 2018 N.Y. Slip Op. 02776, Second Dept 4-25-18**

CORPORATION LAW.

AN ACTION AGAINST A NOT FOR PROFIT CORPORATION FOR BREACH OF A FIDUCIARY DUTY MUST ALLEGE THE FAILURE TO ACT IN GOOD FAITH ON BEHALF OF THE CORPORATION OR ITS MEMBERS, NOT, AS HERE, THE FAILURE TO ACT IN A MEMBER'S PERSONAL BEST INTEREST.

The Second Department noted that an action against a not for profit corporation (here a yacht club) for breach of a fiduciary duty must allege the failure to act in good faith on behalf of the corporation or its members, not the failure to act in good faith in a member's (plaintiff's) personal best interest. The board had excluded plaintiff's domestic partner, who was not a member, from the club: "The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct ... . The directors of a not-for-profit corporation like the Club 'have the fiduciary obligation to act on behalf of the corporation in good faith and with reasonable care so as to protect and advance its interests' ... . Here, however, the complaint did not allege that the Club defendants failed to act in good faith on behalf of the Club or its members' collective interests, but merely alleged that they failed to act in [plaintiff's] personal best interest ... . Accordingly, the complaint did

not state a cause of action to recover damages for breach of fiduciary duty." ***Nachbar v. Cornwall Yacht Club*, 2018 N.Y. Slip Op. 02795, Second Dept 4-25-18**

CRIMINAL LAW.

JUDGE DID NOT MAKE IT CLEAR THAT DEFENDANT'S SENTENCE INCLUDED A PERIOD OF POSTRELEASE SUPERVISION, PLEA VACATED AND MATTER REMITTED.

The Second Department, vacating defendant's plea, determined the judge did not make clear the sentence included a period of postrelease supervision: "A trial court has the constitutional duty to advise a defendant, before pleading guilty, of the direct consequences of a plea of guilty, including any period of postrelease supervision... . Although the court is not required to engage in any particular litany when allocuting the defendant, the record must be clear that the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant... . Here, the record does not make clear that at the time the defendant entered his plea, he was aware that the terms of the County Court's promised sentence included a period of postrelease supervision ... . Accordingly, the judgment must be reversed, the plea vacated, and the matter remitted...". ***People v. James*, 2018 N.Y. Slip Op. 02805, Second Dept 4-25-18**

CRIMINAL LAW, APPEALS.

JUDGE DID NOT RULE ON DEFENDANT'S PRO SE MOTION TO WITHDRAW HIS PLEA, APPEAL HELD IN ABEYANCE, MATTER REMITTED FOR APPOINTMENT OF NEW COUNSEL AND A RULING ON THE MOTION.

The Second Department held the appeal in abeyance because the defendant's pro se motion to withdraw his plea was not ruled on. The matter was sent back for a ruling after defendant was assigned new counsel: "... [T]he County Court erred in failing to consider the defendant's oral pro se application at the resentence proceeding to withdraw his plea of guilty. There is no indication in the record that the court ruled on the defendant's motion. The court neither granted nor denied it on the record before us. As CPL 470.15(1) serves as a legislative restriction on this Court's power to review issues not ruled upon by the trial court ... , the court's failure to rule on the motion precludes our review of the issue raised by the defendant's appeal ... . Accordingly, the matter must be remitted … for further proceedings on the defendant's motion to withdraw his plea of guilty, for which the defendant shall be appointed new counsel, and thereafter a report to this Court on the motion and whether the defendant established his entitlement to withdrawal of his plea of guilty." ***People v. Rovinsky*, 2018 N.Y. Slip Op. 02814, Second Dept 4-25-18**

CRIMINAL LAW, JUDGES.

JUDGE DEPRIVED DEFENDANT OF A FAIR TRIAL BY ASKING QUESTIONS OF WITNESSES AND INTERRUPTING CROSS-EXAMINATION.

The Second Department, reversing defendant's conviction, determined the judge deprived defendant of a fair trial by asking questions of witnesses and interrupting cross-examination: "The principle restraining the court's discretion is that a trial judge's 'function is to protect the record, not to make it' (... . Indeed, when the trial judge interjects often and indulges in an extended questioning of witnesses, even where those questions would be proper if they came from trial counsel, the trial judge's participation presents significant risks of prejudicial unfairness ... . Accordingly, while a trial judge may intervene in a trial to clarify confusing testimony and facilitate the orderly and expeditious progress of the trial, the court may not take on 'the function or appearance of an advocate' ... . Here, the Supreme Court interjected itself into the questioning of witnesses more than 50 times, asking more than 400 questions. The court elicited step-by-step details from several officers regarding their observations and actions during their apprehension of the defendant. In addition, the court elicited and assisted in developing facts damaging to the defense on direct examination of the People's witnesses, bolstering the witnesses' credibility. The court also interrupted cross-examination and generally created the impression that it was an advocate on behalf of the People." ***People v. Hinds*, 2018 N.Y. Slip Op. 02804, Second Dept 4-25-18**

FAMILY LAW, EVIDENCE.

WILLFULNESS IS NOT AN ELEMENT OF CIVIL CONTEMPT, MOTHER'S MOTION TO FIND FATHER IN CIVIL CONTEMPT FOR VIOLATIONS OF ORDERS CONCERNING CONTACT WITH THE CHILDREN SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Family Court, determined mother's motion to find father in civil contempt for violation of orders concerning contact with the children should have been granted. The court need not find the violations were willful: "To prevail on a motion to hold a party in civil contempt pursuant to Judiciary Law § 753(A)(3), the movant must establish by clear and convincing evidence (1) that a lawful order of the court was in effect, clearly expressing an unequivocal mandate, (2) the appearance, with reasonable certainty, that the order was disobeyed, (3) that the party to be held in contempt had knowledge of the court's order, and (4) prejudice to the right of a party to the litigation ... . Prejudice is shown where the party's actions 'were calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of a party' ... . In order for contempt sanctions to be imposed pursuant to Judiciary Law § 753(A), 'willfulness' need not be shown ... . Once the movant makes the required showing, the burden shifts to the alleged contemnor to refute that show-

ing, or to offer evidence of a defense such as an inability to comply with the order ... Here, the hearing record established that the father violated unequivocal mandates of the Family Court, of which he was aware, by removing the children from school and vacationing with them for a one-week period in 2015 without timely notice to the mother, failing to facilitate daily phone contact between the mother and the children during that period, and failing to complete the required parenting training. The record further demonstrates that the mother was prejudiced by those actions. Contrary to the determination of the court, a finding of willfulness was not required to establish the father's civil contempt." ***Matter of Mendoza-Pautrat v. Razdan*, 2018 N.Y. Slip Op. 02790, Second Dept 4-25-18**

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW, EVIDENCE.

INSUFFICIENT PROOF OF COMPLIANCE WITH THE 90 DAY NOTICE MAILING REQUIREMENTS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), PLAINTIFF BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this foreclosure action should not have been granted because the proof of compliance with the Real Property Actions and Proceedings Law (RPAPL) 90 day notice mailing requirements was insufficient: "Proof of the requisite mailing is established with proof of the actual mailings, such as affidavits of mailing or domestic return receipts with attendant signatures, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure ... . Here, in moving for summary judgment, the plaintiff failed to submit an affidavit of service or other proof of mailing by the post office establishing that it properly served [defendant] pursuant to RPAPL 1304. The unsubstantiated and conclusory statement of a vice president of the plaintiff that a 90-day pre-foreclosure notice 'was forwarded by regular and certified mail' to [defendant] 'in full compliance with all requirements of RPAPL § 1304' was insufficient to establish that the notice was actually mailed to [defendant] by first-class and certified mail ...". ***Wells Fargo Bank, NA v. Mandrin*, 2018 N.Y. Slip Op. 02826, Second Dept 4-25-18**

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF FELL FROM A LADDER WHEN A TIRE STORED ON THE ROOF OF A SHED FELL AND STRUCK THE LADDER, THE TIRE WAS NOT BEING HOISTED AND DID NOT NEED TO BE SECURED FOR THE PURPOSES OF PLAINTIFF'S WORK, THE ACCIDENT THEREFORE WAS NOT COVERED UNDER LABOR LAW § 240(1).

The Second Department, reversing Supreme Court, determined the criteria for a "falling object" case under Labor Law § 240(1) had not been met. Tires were stored on the roof of a shed. As plaintiff was climbing a ladder to the roof of the shed, a tire struck the ladder and plaintiff fell. Because the tire was not being hoisted and did not need to be secured, Labor Law § 240(1) did not apply to the facts: " 'To prevail on a cause of action pursuant to section 240(1) [of the Labor Law] in a falling object case, the injured worker must demonstrate the existence of a hazard contemplated under that statute and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein' ... . 'This requires a showing that at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking' ... . 'Labor Law § 240(1) does not apply in situations in which a hoisting or securing device of the type enumerated in the statute would not be necessary or expected'... . Here, the evidence adduced at trial, viewed in the light most favorable to the plaintiff, demonstrated that the tires were not materials that were being hoisted or secured for the purposes of the undertaking, nor was it expected, under the circumstances of this case, that the tires would require securing for the purposes of the undertaking at the time one or more tires fell ... . Therefore, 'the special protection' of Labor Law § 240(1) was not implicated' ...". ***Ruiz v. Ford*, 2018 N.Y. Slip Op. 02820, Second Dept 4-25-18**

REAL ESTATE, FRAUD, NEGLIGENCE, ATTORNEYS.

COMPLAINT STATED A CAUSE OF ACTION AGAINST THE SELLERS OF A CONDOMINIUM FOR FRAUDULENTLY CONCEALING MOLD AND WATER DAMAGE IN THE CONDOMINIUM AND COMMON AREAS, THE COMPLAINT ALSO STATED A MALPRACTICE CAUSE OF ACTION AGAINST THE BUYERS' ATTORNEY.

The Second Department determined the plaintiffs had stated causes of action against the sellers (the Lyubarskys) of a condominium for fraudulently concealing mold and water damage in the condominium and in the common areas. The complaint also alleged plaintiffs' attorney committed malpractice in representing them in the purchase. The court explained the how the doctrine of caveat emptor (buyer beware) relates to the allegations in the complaint: " 'New York adheres to the doctrine of caveat emptor and imposes no liability on a seller for failing to disclose information regarding the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller which constitutes active concealment'... . 'If however, some conduct (i.e., more than mere silence) on the part of the seller rises to the level of active concealment, a seller may have a duty to disclose information concerning the property'... . 'To maintain a cause of action to recover damages for active concealment, the plaintiff must show, in effect, that the seller or the seller's agents thwarted the plaintiff's efforts to fulfill his responsibilities fixed by the doctrine of caveat emptor' ... . Here, accepting the facts alleged in the complaint as true and according the plaintiff the benefit of every possible favorable inference... , the complaint sufficiently states a cause of action to recover damages for fraud on the theory that the Lyubarskys actively concealed defects throughout the common

areas of the condominium building. The complaint alleges that the Lyubarskys took several steps to hide the existence of leaks and mold damage including, inter alia, claiming that they had lost the key to the storage area in the cellar which was assigned to the subject condominium, and removing and replacing damaged sheetrock from the cellar and the parking area. These allegations, if true, might have thwarted the plaintiff's efforts to fulfill her responsibilities imposed by the doctrine of caveat emptor with respect to the common areas of the building ...". ***Razdolskaya v. Lyubarsky*, 2018 N.Y. Slip Op. 02817, Second Dept 4-25-18**

REAL PROPERTY LAW.

PLAINTIFF RECORDED HER DEED AND MORTGAGE PRIOR TO THE RECORDING OF A MORTGAGE BY DEFENDANT BANK, DEFENDANT BANK WAS NOT A GOOD FAITH PURCHASER IN THAT IT IS DEEMED TO HAVE PRIOR NOTICE OF PLAINTIFF'S INTERESTS, SUPREME COURT REVERSED.

The Second Department, reversing Supreme Court, determined plaintiff (Heidi) had recorded her deed and mortgage before defendant bank (M & T) recorded its mortgage (to secure a loan to a co-tenant). Therefore defendant bank had notice of plaintiff's prior interests: " 'The New York Recording Act ... , inter alia, protects a good faith purchaser for value from an unrecorded interest in a property, provided such a purchaser's interest is first to be duly recorded ... . The status of good faith purchaser for value cannot be maintained by a purchaser with either notice or knowledge of a prior interest or equity in the property, or one with knowledge of facts that would lead a reasonably prudent purchaser to make inquiries concerning such'... . 'The recording of a transaction involving real property provides potential subsequent purchasers [and encumbrancers] with notice of previous conveyances and encumbrances that might affect their interests. If the [encumbrancer] fails to use due diligence in examining the title, he or she is chargeable, as a matter of law, with notice of the facts which a proper inquiry would have disclosed' ... . The encumbrancer 'must be presumed to have investigated the title, and to have examined every deed or instrument properly recorded, and to have known every fact disclosed or to which an inquiry suggested by the record would have led' ... . Here, the Supreme Court erred in failing to award Heidi ... proceeds from the sale of the property, the entire principal of her mortgage, plus interest, and reasonable collection costs, including an attorney's fee and disbursements incurred in collecting the indebtedness secured by the mortgage. Heidi demonstrated that her mortgage and the ... deed were duly recorded prior to M & T's mortgage. Therefore, Heidi established that M & T is chargeable with notice of these prior interests." ***Gregg v. M&T Bank Corp.*, 2018 N.Y. Slip Op. 02774, Second Dept 4-25-18**

WORKERS' COMPENSATION LAW, CORPORATION LAW.

DEFENDANT WAS THE ALTER EGO OF PLAINTIFF'S EMPLOYER,THEREFORE WORKERS' COMPENSATION WAS THE ONLY REMEDY FOR THE PLAINTIFF WHO WAS INJURED ON THE JOB.

The Second Department determined that the defendant was the alter ego of plaintiff's employer and therefore plaintiff's only remedy for the on the job injury was under the Workers' Compensation Law: "Generally, employees injured in the course of their employment may recover against their employers only under the Workers' Compensation Law ... . Workers' Compensation Law § 29(6) expressly provides that '[t]he right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee' ... . The exclusive remedy provisions also bar employees from seeking damages from 'alter egos' of their employers ... .. The alter ego rule applies when one of the entities in question controls the other or when the two entities operate as a single integrated entity ... . A mere showing that the entities are related—by, for example, sharing officers or ownership—is insufficient... . Here, the defendant established, prima facie, that it was an alter ego of the plaintiff's employer by submitting evidence that, among other things, in addition to owning the premises, it was the sole owner and manager of the limited liability company that was the plaintiff's employer, that the plaintiff's employer was formed to provide bus drivers for the defendant's pupil transportation business, and that the two entities shared the same Workers' Compensation insurance policy ...". ***Clarke v. First Student, Inc.*, 2018 N.Y. Slip Op. 02766, Second Dept 4-25-18**

THIRD DEPARTMENT

CRIMINAL LAW, CONSTITUTIONAL LAW, APPEALS.

ARGUMENT THAT THE SPECIAL PROSECUTOR FOR THE JUSTICE CENTER FOR THE PROTECTION OF PEOPLE WITH SPECIAL NEEDS DID NOT HAVE THE AUTHORITY TO PROSECUTE DEFENDANT WAS NOT RAISED BELOW AND COULD NOT BE DECIDED WITHOUT ADDITIONAL FACTS DEVELOPED ON REMITTAL, THE RECORD ON APPEAL THEREFORE WILL NOT ALLOW REVERSAL IN THE INTEREST OF JUSTICE.

The Third Department, over a dissent, determined it could not reach a constitutional issue, regarding whether the authority to prosecute the defendant had been properly delegated to the Special Prosecutor for the Justice Center for the Protection of People with Special Needs, because it was not raised below. The dissent argued the court could exercise its interest of justice jurisdiction and send the case back for a factual determination of the issue (delegation of authority to prosecute): "Defendant first argues that the statute authorizing creation of the Justice Center (see Executive Law § 552 [2]) violates the State Constitution because the statute permits an appointed special prosecutor to conduct prosecutions, thereby usurping the

constitutional responsibilities and power of the local District Attorney and the Attorney General, both of whom are elected officials. In the alternative, defendant argues that the statute can be viewed as constitutional only if the District Attorney grants the special prosecutor authority to prosecute and retains oversight and ultimate responsibility for the prosecution, but that these conditions were not met in this case. Thus, defendant argues, the indictment must be dismissed because the Justice Center lacked the authority to prosecute him. * * * This Court is permitted only to reverse or modify in the interest of justice ... . But a full review of the issue would be impossible without remittal, so, at this point, we do not now know if we would ultimately reverse, modify or affirm. Because we do not know what the outcome would be, and since it is possible that the outcome could be to affirm, we find no authority that would permit us to take corrective action with respect to this issue in the interest of justice." ***People v. Cubero*, 2018 N.Y. Slip Op. 02839, Third Dept 4-26-18**

CRIMINAL LAW, EVIDENCE.

THE MANNER IN WHICH A PRISON BODY CAVITY SEARCH WAS CONDUCTED DEEMED UNREASONABLE AND A VIOLATION OF THE FOURTH AMENDMENT, COCAINE SEIZED FROM DEFENDANT'S BUTTOCKS-AREA SHOULD HAVE BEEN SUPPRESSED.

The Third Department, over a concurrence and a two-justice dissent, reversing County Court, determined that prison personnel violated defendant's Fourth Amendment rights in the manner a body cavity search was conducted. A packet of cocaine was removed from defendant's buttocks-area during a strip search. Apparently the package could be seen but did not fall out on its own: "Here, there was probable cause, but no showing or claim of an emergency ... . Considering that defendant was lying face down, naked and handcuffed, it is evident that the officers could keep him under full surveillance without any concern that the wrapped drugs would be absorbed into his body while efforts were made to procure a warrant ... . Nor was any attempt made to seek the assistance of medical personnel to secure the contraband in a safe, hygienic manner... . Also, the record is unclear as to whether [the officer] was wearing gloves. Under the second Bell factor [*Bell v. Wolfish*, 441 US 520], the manner in which this search was conducted was not reasonable. Given the above, we conclude that the search was conducted in violation of the Fourth Amendment and that the recovered drugs should have been suppressed." ***People v. Holton*, 2018 N.Y. Slip Op. 02836, Third Deptp 4-26-18**

PERSONAL INJURY, EVIDENCE.

VERDICT EXONERATING DEFENDANT DRIVER OF ANY COMPARATIVE FAULT IN THIS PEDESTRIAN ACCIDENT CASE SHOULD HAVE BEEN SET ASIDE, DEFENDANT TESTIFIED SHE SAW PERSONS IN THE ROAD BUT DID NOT SLOW DOWN.

The Third Department determined plaintiff's motion to set aside the defense verdict in this pedestrian-car accident case (exonerating defendant driver from any comparative fault) should have been granted. Defendant testified she saw persons in the road about 100 yards ahead but did not slow down. When she realized she was going to hit someone she swerved to the left, apparently striking plaintiff at that point: "As a general matter, a motorist has a duty to maintain a proper lookout under the driving circumstances presented and to maintain a reasonably safe rate of speed... . A motorist is further 'required to keep a reasonably careful look out for pedestrians, to see what was there to be seen, to sound the horn when a reasonably prudent person would have done so to warn a pedestrian of danger and to operate the car with reasonable care to avoid hitting any pedestrian on the roadway' ... . These principles in mind, defendant testified that she first observed three people at the edge of Route 9N in front of the Algonquin restaurant heading across the road toward the parking lot on the west side. She estimated being '[p]robably about a football field' away when she first saw the pedestrians. She also estimated her speed at 30 miles per hour and acknowledged that she did not slow down. Explaining how the accident occurred, defendant testified as follows: 'As I got closer to the people, who I thought were crossing the road, they were not moving and I knew that if I continued I would hit them so I severely twisted my wheel of the car thinking I could get around them.' She stated that, as she turned her wheel to the right, the pedestrians were on her left. She did not decrease her speed prior to swerving and could not remember sounding her horn. Defendant's version of the accident places Blanchard in the roadway, while Blanchard testified that she was in the west shoulder area at the time of impact. Even accepting defendant's version, her testimony confirms that Blanchard was within her view for a distance of about 100 yards and defendant was aware that Blanchard was crossing the road, and yet, defendant did not slow down or sound her horn. Defendant's own account confirms that she failed to take any evasive action until the last moment. In our view, defendant's failure to take reasonable measures to avoid hitting Blanchard gives rise to some degree of comparative fault for this accident. As the jury's verdict exonerating defendant could not have been reached on any fair interpretation of this evidence, a new trial is in order." ***Blanchard v. Chambers*, 2018 N.Y. Slip Op. 02852, Third Dept 4-26-18**

RETIREMENT AND SOCIAL SECURITY LAW, PERSONAL INJURY.

CRITERIA FOR DETERMINING WHETHER A SLIP AND FALL ENTITLES A POLICE OFFICER TO ACCIDENTAL DISABILITY RETIREMENT BENEFITS UNDER THE RETIREMENT AD SOCIAL SECURITY LAW EXPLAINED IN DEPTH, MATTER WAS REMITTED FOR FACTS AND CONCLUSIONS UNDER THE LAW ARTICULATED IN THE OPINION.

The Third Department, in a full-fledged opinion by Justice McCarthy, over a partial dissent, took pains to explain the current law distinguishing between a nonactionable misstep from an actionable slip and fall in the context of a police officer's application for accidental disability retirement benefits. The officer fell descending stone steps which he had used without incident a couple days before. The officer testified there was a slimy or icy substance on the step which he did not notice until after the fall. The Third Department couldn't discern the precise grounds for the state comptroller's denial of the benefits and sent the matter back for findings and conclusions based upon the law as explained in the opinion (which is too detailed to be fully described here): "... [T]he controlling standard for determining whether an injury was caused by an accident for purposes of the Retirement and Social Security Law remains whether the precipitating event was sudden, unexpected and not a risk of the work ordinarily performed ... . In considering whether a particular petitioner has met that standard, courts should not rely on whether a condition was readily observable. Denial of benefits continues to be appropriate where the injury was caused by the employee's misstep. Whether the employee's inattention caused an accidental injury depends on the circumstances — i.e., was it essentially a misstep, without more, or was it based on the failure to notice something that was readily observable — and presents a factual issue. Similarly, when determining whether a precipitating event was unexpected, respondent and courts may continue to consider whether the injured person had direct knowledge of the hazard prior to the incident or whether the hazard could have been reasonably anticipated, so long as such a factual finding is based upon substantial evidence in the record." ***Stancarone v. DiNapoli*, 2018 N.Y. Slip Op. 02844, Third Dept 4-26-18**

FOURTH DEPARTMENT

ATTORNEYS.

PRO SE PLAINTIFF'S CAUSE OF ACTION ALLEGING THE DEFENDANT ATTORNEY'S FEE WAS UNCONSCIONABLE SHOULD NOT HAVE BEEN DISMISSED; MOTION TO DISQUALIFY DEFENDANT'S ATTORNEY BECAUSE PLAINTIFF HAD INITIALLY CONSULTED WITH AN ATTORNEY AT THE DEFENDANT'S ATTORNEY'S FIRM PROPERLY DENIED.

The Fourth Department, reversing (modifying) Supreme Court determined the cause action alleging defendant attorney's fee was unconscionable should not have been dismissed. The court further determined that plaintiff's motion to disqualify defendant's attorney because plaintiff had initially consulted with an attorney at the defendant's attorney's firm was properly denied: "Accepting as true the allegations in the complaint and the averments in the affidavits submitted in opposition to the motion, we conclude that plaintiff has sufficiently alleged the elements of procedural and substantive unconscionability. As for procedural unconscionability, plaintiff alleged that, before entering into the agreement, he was not informed of the nature of the anticipated charges or the prospects of incarceration, and he was led to believe that defendant would be able to resolve the case without a prison sentence. At the time he entered into the agreement, plaintiff was in the hospital, and defendant was, or was perceived to be, an experienced attorney with unparalleled expertise in defending against cases involving driving while intoxicated. As for substantive unconscionability, plaintiff alleged that defendant's $125,000 fee was at least three times larger than, and thus drastically out of proportion with, fees charged in similar cases. We further conclude that defendant's evidentiary submissions in support of the motion, which included his own affidavit and that of an expert, did not conclusively establish that the agreement was " fair, reasonable, and fully known and understood' " by plaintiff ... . [The submitted] affidavits establish that the attorney with whom plaintiff consulted had no recollection and kept no notes of the consultation, did not share with defendant's attorney any information that he learned during the consultation, and would not discuss the present action with defendant's attorney in the future. Furthermore, the affidavits establish that the law firm employs screening procedures consistent with the Rules of Professional Conduct and that defendant's attorney would not be sharing any fees with the attorney with whom plaintiff consulted. Thus, the affidavits establish compliance with rule 1.18 of the Rules of Professional Conduct (22 NYCRR 1200.0), and we conclude that the court properly exercised its discretion in denying the motion ... . ***Divito v. Fiandach*, 2018 N.Y. Slip Op. 02922, Fourth Dept 4-27-18**

CIVIL PROCEDURE.

PLAINTIFF ENTITLED TO RECOVER FROM DEFENDANT THE COST OF ALTERNATE SERVICE BECAUSE DEFENDANT DID NOT RETURN THE ACKNOWLEDGMENT OF RECEIPT (CPLR 312-a) UPON BEING SERVED BY MAIL.

The Fourth Department, reversing Supreme Court, determined plaintiff was entitled to the costs of serving the defendant by alternate means after defendant failed to return the acknowledgment of receipt (of service by mail) was not returned within 30 days: "Plaintiff commenced this negligence action by serving defendants by mail pursuant to CPLR 312-a (a) and

thereafter utilized 'an alternative method' of service of process when 'the acknowledgment of receipt' was not returned by defendants or the other persons set forth in CPLR 312-a (b) within the requisite 30-day period. Plaintiff moved for, inter alia, an immediate judgment in the amount of $110.53, i.e., the amount expended by plaintiff in serving defendants by the alternative method of service of process ... . Supreme Court erred in denying that part of plaintiff's motion... . Here, plaintiff submitted prima facie evidence that his attorney mailed the requisite documents to defendants pursuant to CPLR 312-a (a), and defendants failed to raise an issue of fact with respect to that service." ***McGriff v. Mallory*, 2018 N.Y. Slip Op. 03003, Third Dept 4-26-18**

CRIMINAL LAW.

UNDER THE DRUG LAW REFORM ACT (DRLA) A DEFENDANT CONVICTED OF A QUALIFYING DRUG FELONY CANNOT BE SENTENCED AS A PERSISTENT FELONY OFFENDER (PFO).

The Fourth Department, reversing County Court, in a full-fledged opinion by Justice DeJoseph, in a matter of first impression, determined a defendant convicted of a qualifying drug felony cannot, under the Drug Law Reform Act (DLRA), be sentenced as a persistent felony offender (PFO): "In March 2016, defendant, by counsel, moved pursuant to CPL 440.20 to vacate his sentence on the ground that he was illegally sentenced as a PFO. Defendant contended that, because the crimes of CPCS in the third degree (Penal Law § 220.16 [1]) and CSCS in the third degree (§ 220.39 [1]) fall within Penal Law article 220, a defendant convicted of those crimes is not subject to sentencing as a PFO. Defendant contended that the 2004 DLRA removed the trial court's discretion to sentence a defendant convicted of controlled substance or marihuana offenses as a PFO. * * * The plain language of the statutes is clear that, when a defendant is convicted of a drug offense, he or she must be sentenced under the provisions outlined by Penal Law § 60.04, 'notwithstanding the provisions of any law.' Thus, inasmuch as section 60.04 does not authorize sentencing such a defendant as a PFO, such a defendant cannot be sentenced pursuant to any provisions that do authorize sentencing as a PFO. While there are no definitive rulings on this issue by the Court of Appeals or any of the Appellate Divisions, trial courts have held that a drug offender is ineligible for PFO sentencing ... . As noted by the Court of Appeals, 'when the legislature enacted the . . . DLRA, it sought to ameliorate the excessive punishments meted out to low-level, nonviolent drug offenders under the so-called Rockefeller Drug Laws, and therefore the statute is designed to spread relief as widely as possible, within the bounds of reason, to its intended beneficiaries' ... . We believe that our interpretation of the DLRA is consistent with the remedial purpose of the DLRA, and we therefore conclude that Penal Law §§ 60.04 and 70.70 operate to preclude a court from sentencing a defendant found guilty of a qualifying drug felony as a PFO." ***People v. Boykins*, 2018 N.Y. Slip Op. 02919, Fourth Dept 4-27-18**

CRIMINAL LAW.

THE PEOPLE'S GROUND FOR STEP ONE OF THE BATSON CHALLENGE PROCEDURE WAS NOT FACTUALLY CORRECT, THE JUDGE SHOULD NOT HAVE PROCEEDED TO STEP TWO AND THE JUROR SHOULD NOT HAVE BEEN SEATED.

The Fourth Department reversed defendant's conviction and dismissed the indictment because of the court's errors in handling a *Batson* challenge. The People argued that defense counsel was using all peremptory challenges to exclude women, which was not the case. The court accepted the argument and proceeded to step two of the *Batson* procedure by asking defense counsel for a gender neutral explanation. Defense counsel stated that the potential juror was a nurse and may have seen victims of domestic abuse. The judge did not accept defense counsel's reason. The Fourth Department found that step one of the procedure was flawed because defense counsel had excluded both men and women, and noted that the reason given by defense counsel for step two was sufficient: "... [T]he issue whether the People established a prima facie case of discrimination at step one of the Batson inquiry is not moot. Whether a Batson applicant made out a prima facie case of discrimination is moot only if the court proceeded to step three of the inquiry and 'has ruled on the ultimate question of intentional discrimination' '... . Here, however, the court 'stopped at step two and wrongly stated that the proffered reason for the challenge was not [gender] neutral[, and thus] . . . it cannot be said that the trial court [had] ruled on the ultimate question of intentional discrimination' ... . With respect to the merits of defendant's contention concerning the step one inquiry, we agree with him that the People failed to establish a prima facie case of discrimination. The only ground asserted by the People in support of their Batson application was that every peremptory challenge exercised by defendant was used to strike a woman from the jury panel. As defendant argued in opposition, the People's assertion was incorrect. In fact, defendant had previously exercised peremptory challenges to excuse two men from the jury panel. Thus, the only fact articulated by the People in support of their Batson application is belied by the record. Inasmuch as the People failed to make out a prima facie case of discrimination, the court erred in proceeding to step two of the inquiry and ultimately in seating the juror notwithstanding defendant's peremptory challenge ...". ***People v. Smouse*, 2018 N.Y. Slip Op. 02921, Fourth Dept 4-27-18**

CRIMINAL LAW.

SENTENCE IMPOSED AFTER FAILURE TO PAY RESTITUTION UNDULY HARSH AND SEVERE.

The Fourth Department determined the sentence imposed based upon failure to pay restitution was harsh and excessive: "... [T]he sentence imposed by County Court is unduly harsh and severe. The sole basis for the declaration of delinquency was defendant's failure to pay restitution to the victims of his crimes, and the declaration was filed approximately four months after defendant was placed on probation. Defendant admitted to the violation and, by the time of sentencing, he had paid $2,500 of the $17,775 he owed in restitution. The court nevertheless revoked probation and sentenced defendant to the maximum term of imprisonment for each offense with the sentences running consecutively, for an aggregate sentence of 3⅓ to 10 years. Inasmuch as defendant's crimes are nonviolent and he had no prior criminal record aside from a misdemeanor charge to which he pleaded guilty the day before his plea in this case, we modify the judgment as a matter of discretion in the interest of justice by directing that the sentences run concurrently, thus reducing the aggregate sentence to 2⅓ to 7 years ...". ***People v. Lloyd*, 2018 N.Y. Slip Op. 03032, Fourth Dept 4-27-18**

CRIMINAL LAW, APPEALS, IMMIGRATION.

DEFENDANT ENTITLED TO DEMONSTRATE SHE WOULD NOT HAVE PLED GUILTY HAD SHE BEEN INFORMED OF THE DEPORTATION CONSEQUENCES, THE ISSUE SURVIVES THE WAIVER OF APPEAL AND THE FAILURE TO PRESERVE.

The Fourth Department determined that defendant was entitled to attempt to demonstrate she would not have pled guilty had she been informed of the deportation consequence of her plea, even though the issue had not been preserved and she had waived her right to appeal: "... [D]efendant, a noncitizen, contends that her felony guilty plea was not knowingly, voluntarily, and intelligently entered because County Court failed to advise her of the potential deportation consequences of such a plea, as required by People v. Peque (22 NY3d 168 ...) . As a preliminary matter, we note that defendant's challenge to the voluntariness of her plea survives her waiver of the right to appeal... . Furthermore, contrary to the People's contention, preservation was not required inasmuch as the record bears no indication that defendant knew about the possibility of deportation ... . With respect to defendant's substantive contention, the People correctly concede that the court did not properly advise defendant of the deportation consequences of her plea. We therefore hold the case, reserve decision and remit the matter to County Court to afford defendant an opportunity to move to vacate her plea based upon a showing that 'there is a reasonable probability' that she would not have pleaded guilty had she known that she faced the risk of being deported as a result of the plea' ...". ***People v. Roman*, 2018 N.Y. Slip Op. 03048, Fourth Dept 4-27-18**

CRIMINAL LAW, EVIDENCE.

A DEFENDANT WHO REQUESTS A RESTITUTION HEARING IS ENTITLED TO ONE, EVEN WHERE A HEARING HAD BEEN HELD AFTER DEFENDANT'S FIRST TRIAL.

The Fourth Department noted that defendant had requested a restitution hearing and therefore the court was required to hold one. Defendant's conviction in her first trial was reversed and a new trial was ordered. Even though a hearing had been held in the first proceeding, she was entitled to a hearing after the second trial: "... [T]he court erred in denying her request for a restitution hearing. It is well settled that where, as here, a defendant requests a restitution hearing, Penal Law § 60.27 (2) requires that one be provided, 'irrespective of the level of evidence in the record' ... . Once we reversed the prior judgment and granted defendant a new trial, she was 'restored to the status obtaining before the initial trial' ... and, as a result, it is irrelevant that a hearing was held following the first trial." ***People v. Case*, 2018 N.Y. Slip Op. 02995, Fourth Dept 4-27-18**

CRIMINAL LAW, EVIDENCE.

JURY INSTRUCTION ALLOWED CONVICTION ON A THEORY NOT IN THE INDICTMENT, COUNT DISMISSED; SENTENCING JUDGE DID NOT CONSIDER MITIGATING FACTORS AND INDICATED DEFENDANT WAS SENTENCED HARSHLY BECAUSE HE WENT TO TRIAL, SENTENCE REDUCED.

The Fourth Department determined that the harassment jury instruction was defective because it allowed the jury to convict on a theory that was not alleged in the indictment. The Fourth Department further found that the 18-year sentence for rape was unduly harsh and reduced the sentence to eight years. The Fourth Department noted that the sentencing court did not take certain mitigating factors into consideration and indicated defendant was sentenced harshly because he had decided to go to trial: "Here, the indictment charged defendant with harassment in the second degree on the ground that ... he slapped the complainant with the intent to harass, annoy, or alarm her. Nevertheless, the court instructed the jury that it could find him guilty if he shoved her or subjected her to other forms of physical contact. The evidence at trial could have established either theory. Therefore, that part of the judgment convicting defendant of harassment in the second degree must be reversed ... . [T]he sentence imposed for rape in the first degree is unduly harsh and severe. The alleged incident

occurred in the context of an intimate relationship that lasted several months between two otherwise consenting adults who were close in age. The complainant had the opportunity to report the incident to the police immediately after it happened but chose not to do so. In the recorded conversations between defendant and the complainant, which occurred two to three months after the incident, the complainant repeatedly expressed satisfaction with her relationship, and a willingness to use the criminal justice system to gain the upper hand in it. We note that defendant's history of contacts with the criminal justice system is not extensive, and thus it does not weigh heavily against him. The record does not indicate that the sentencing court considered any of the above substantial mitigating factors in imposing the sentence. To the contrary, the court expressed only that it wished to impose a sentence for rape in the first degree in excess of the offers made during the plea bargaining process. Indeed, the sentence of 18 years of incarceration is double that of the most recent plea offer. It is well established that a defendant may not be punished for exercising his constitutional right to a trial ... . Although a sentence after trial usually will be harsher than a sentence accompanying a prior plea offer ... , a defendant's refusal to plead guilty does not absolve the court of its responsibility to consider appropriate sentencing factors ...". ***People v. Morales*, 2018 N.Y. Slip Op. 02958, Fourth Dept 4-27-18**

CRIMINAL LAW, EVIDENCE.

IMPORTANT WITNESS RECANTED HER TRIAL TESTIMONY, MOTION TO VACATE CONVICTION SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING.

The Fourth Department determined defendant motion to vacate his conviction should not have been denied without a hearing. A prosecution witness recanted her trial testimony: "The motion was based on the affidavit of a prosecution witness who recanted her trial testimony that defendant admitted to her that he started a certain house fire. That testimony formed the basis for defendant's conviction of arson in the second degree. Notably, the witness averred that, 'Before the trial[,] the police investigator told me if I testified on [defendant's] behalf they would take my daughter away. I am still concerned about this.' The People did not submit an opposing affidavit from any of the police officers involved in the case. The court denied the motion without a hearing upon finding that the witness's recantation was unreliable. We conclude based on the totality of the circumstances that the court erred in denying that part of the motion with respect to the conviction of arson in the second degree without first holding a hearing ... . The witness's 'trial testimony, if false, was extremely prejudicial to defendant inasmuch as, without that testimony, there would have been no basis for the jury to convict defendant' for setting the fire at issue in the arson in the second degree count ...". ***People v. Grant*, 2018 N.Y. Slip Op. 02951, Fourth Dept 4-27-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE TRIAL JUDGE RESERVED DECISION ON DEFENDANT'S MOTION FOR A TRIAL ORDER OF DISMISSAL ON THE RESISTING ARREST CHARGE AND DID NOT RULE ON IT AFTER CONVICTION, ON APPEAL THE FAILURE TO RULE CANNOT BE CONSIDERED A DENIAL, MATTER REMITTED FOR A RULING.

The Fourth Department noted that the trial judge reserved decision on defendant's motion for a trial order of dismissal on the resisting arrest charge. Because the judge never ruled on the motion, the matter was remitted for a ruling: "Defendant also challenges the sufficiency of the evidence with respect to the conviction of resisting arrest. We note that Supreme Court denied defendant's motion for a trial order of dismissal with respect to the charges of burglary in the third degree and petit larceny but reserved decision with respect to the resisting arrest charge. The matter was submitted to the jury, which returned a verdict convicting defendant of all charges. The court never ruled on the remainder of the motion. Thus, we do not address defendant's contention with respect to the resisting arrest charge because, 'in accordance with People v. Concepcion (17 NY3d 192, 197-198 [2011]) and People v. LaFontaine (92 NY2d 470, 474 [1998], rearg denied 93 NY2d 849 [1999]), we cannot deem the court's failure to rule on [that part of] the . . . motion as a denial thereof' ... . We therefore hold the case in appeal No. 1, reserve decision, and remit the matter to Supreme Court for a ruling on the remainder of the motion." ***People v. Hymes*, 2018 N.Y. Slip Op. 02942, Fourth Dept 4-27-18**

CRIMINAL LAW, JUDGES.

SENTENCING JUDGE DID NOT HAVE THE AUTHORITY TO ASSURE DEFENDANT OF ADMISSION INTO THE SHOCK PROGRAM, DEFENDANT'S PLEA VACATED.

The Fourth Department, vacating defendant's guilty plea, determined the sentencing court did not have the authority to promise defendant would go to "shock camp" and defendant had relied on the judge's promise when he pled guilty: "The record establishes that the court believed it had the authority to grant defendant admission into a shock incarceration program and that it made such admission a condition of defendant's guilty plea. At sentencing, the court acted in accordance with its perceived authority and the plea agreement by imposing a term of incarceration of 1½ to 3 years 'with shock camp.' There is no dispute that defendant was not admitted into a shock incarceration program. We agree with defendant that the court had no authority to assure him of admission into a shock incarceration program or to impose such as part of the

sentence ... . Inasmuch as the record establishes that defendant, in accepting the plea, relied on a promise of the court that could not, as a matter of law, be honored, defendant is entitled to vacatur of his guilty plea ...". ***People v. Smith*, 2018 N.Y. Slip Op. 03025, Fourth Dept 4-27-18**

CRIMINAL LAW, JUDGES, EVIDENCE.

THE JUDGE DID NOT HAVE THE AUTHORITY TO GRANT DEFENSE COUNSEL'S REQUEST FOR A VIDEOTAPE OF AN INTERVIEW OF THE CHILD (ALLEGED) VICTIM IN THIS SEXUAL OFFENSE CASE, THE INTERVIEW WAS CONDUCTED BY A PRIVATE PARTY AND WAS DISCOVERABLE ONLY IF IT CONSTITUTED BRADY (EXCULPATORY) MATERIAL, THE JUDGE DID NOT VIEW THE TAPE TO DETERMINE WHETHER IT WAS BRADY MATERIAL.

The Fourth Department determined a County Court judge did not have the authority to grant the defense request for a videotape of an interview of the child (alleged) victim in this sexual offense case. The child was interviewed by a private child advocacy group (Bivona). The only ground upon which the court could grant the request was that the videotape constituted exculpatory (Brady) material. However, the judge did not conduct an in camera review of the tape, and therefore had no basis for determining the tape was exculpatory. The petitioner here (the DA) brought this Article 78 proceeding to prohibit the respondent (the judge) from allowing defense counsel to review the tape: "... [R]espondent issued a written order acknowledging that the video recording did not constitute Rosario material and that he thus lacked any authority to order its disclosure on that ground ... . Instead, respondent concluded that the video recording could potentially contain exculpatory evidence, which petitioner would be obligated to disclose under Brady v. Maryland ... . Respondent determined that neither he nor the 'untrained prosecutor' could make the determination whether the person interviewing the child 'employ[ed] suggestive interrogation techniques.' Rather, 'only defense counsel, with full knowledge of the defendant's case[, could] make the proper assessment.' As a result, respondent again ordered petitioner to permit defendant's attorney to inspect the video recording. * * * ... [A] prosecutor possesses some discretion in deciding what evidence should be disclosed to the defense ... but, 'where a request [for Brady material] is made and there is some basis' for believing that the prosecutor may be in possession of potentially exculpatory material, deference to the prosecutor's discretion must give way, and the duty to determine the merits of the request for disclosure then devolves on the trial court' ... . Nevertheless, '[d]iscovery which is unavailable pursuant to the statute may not be ordered based on principles of due process because there is no general constitutional right to discovery in criminal cases' ... . Here, there has been no determination that the video recording contains exculpatory evidence, and thus defendant has no right to disclosure thereof. Inasmuch as respondent required petitioner to disclose evidence before determining whether defendant is entitled to such disclosure, we conclude that respondent acted in excess of his authority and that a writ of prohibition is the appropriate remedy ...". ***Matter of Doorley v. Castro*, 2018 N.Y. Slip Op. 02939, Fourth Dept 4-27-18**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

SCHIZOPHRENIA DIAGNOSIS DID NOT JUSTIFY AN UPWARD DEPARTURE IN THIS SEX OFFENDER REGISTRATION ACT (SORA) RISK ASSESSMENT PROCEEDING.

The Fourth Department determined County Court should not have granted the People's request for an upward departure in this Sex Offender Registration Act (SORA) risk assessment proceeding based upon a schizophrenia diagnosis: "Although the risk assessment instrument prepared by the Board of Examiners of Sex Offenders classified defendant as a presumptive level two risk, County Court granted the People's request for an upward departure to a level three risk based on defendant's alleged diagnosis of schizophrenia. That was error. Even if defendant in fact suffers from schizophrenia, 'the record is devoid of evidence that the alleged mental illness is causally related to any risk of reoffense'... . Contrary to the People's contention, the fact that defendant exhibits many symptoms of schizophrenia does not supply the necessary clear and convincing evidence that the disorder is causally related to an increased risk of future sex offending ...". ***People v. Robinson*, 2018 N.Y. Slip Op. 02986, Fourth Dept 4-27-18**

EMPLOYMENT LAW, CONTRACT LAW, ATTORNEYS.

LIQUIDATED DAMAGES CLAUSE IN NON-COMPETE COVENANT ENFORCEABLE, ATTORNEY'S FEES NOT ENCOMPASSED BY THE LIQUIDATED DAMAGES.

The Fourth Department determined the liquidated damages provision in the non-compete covenant was enforceable and the defendant should have been granted summary judgment on its claim for attorney's fees pursuant to the employment contract. Plaintiffs had argued the liquidated damages encompassed the defendant's attorneys' fees: "... [W]e conclude that the court properly determined that defendant met its initial burden of establishing that the liquidated damages clauses are enforceable because they represent a 'reasonable measure of the anticipated probable harm' ... , and plaintiffs failed to raise an issue of fact. We note that plaintiffs do not dispute that the potential damages flowing from a breach of the restrictive

covenant were not readily ascertainable at the time the parties entered into the employment agreements ... . Indeed, the fact that these types of damages are difficult to measure provides the foundation for a liquidated damages clause ... . [T]he attorney fee clause of the employment agreement is not duplicative of the liquidated damages clause. One of the express purposes of the liquidated damages clause is 'avoiding the costs, expenses, and uncertainties of litigation over the amount of actual damages that will be suffered by the Employer in the event of breach' ... . Here, defendant seeks attorney's fees and costs incurred in enforcing the restrictive covenant and the liquidated damages clause, which is distinct from any attorney's fees and costs that would be incurred in litigation over the amount of actual damages ...". ***Mathew v. Slocum-Dickson Med. Group, PLLC*, 2018 N.Y. Slip Op. 03059, Fourth Dept 4-27-18**

FAMILY LAW.

WHERE FATHER RELINQUISHED CUSTODY BY CONSENT, HE NEED NOT MAKE A THRESHOLD SHOWING OF A CHANGE IN CIRCUMSTANCES TO BE ENTITLED TO A HEARING ON HIS CUSTODY PETITION, NUMEROUS LEGAL AND FACTUAL ERRORS BY THE JUDGE REQUIRED THAT THIS MATTER BE SENT BACK FOR HEARINGS AND RULINGS ON CUSTODY AND VISITATION ISSUES RAISED BY THE FATHER'S PETITION.

The Fourth Department, reversing Family Court, determined father's petition for custody should not have been dismissed without a hearing because his prior relinquishment of custody was by consent and therefore no prior order had been issued denying father custody based upon extraordinary circumstances. Where there exists no prior order denying a parent custody based upon extraordinary circumstances, the parent need not show a change in circumstances to warrant a custody hearing. The Fourth Department went on to find, based on the record before it, that extraordinary circumstances justifying the denial of father's custody petition existed, but the matter had to be remitted for a determination whether a change in custody was in the best interests of the child (the record was insufficient for an appellate court ruling on that issue). Numerous errors made by the judge and the consequent insufficient record prevented the Fourth Department from ruling on father's visitation requests, so the matter was remitted for a hearing on that issue as well: "With respect to the father's alternative request for increased visitation, including overnight visitation with the child, we agree with the father on his cross appeal that the court's determination to deny that request in part was not based on a sound and substantial basis in the record inasmuch as the court's written decision is riddled with misstatements and incorrect assertions of fact ... . 'Having revived the [father's] petition, we are mindful of the fact that we possess the power to conduct an independent review of an adequately developed record' ... . We are unable to do so on this record, however, inasmuch as the court precluded the father from presenting relevant evidence with respect to the issue of visitation. We therefore further direct the court on remittal to determine following the hearing whether, if a change in custody is denied, an increase in visitation is nevertheless in the best interests of the child." ***Matter of Schultz v. Berke*, 2018 N.Y. Slip Op. 02945, Fourth Dept 4-27-18**

FORECLOSURE.

BANK WHICH PURPORTEDLY ACCELERATED THE DEBT DID NOT HAVE STANDING TO DO SO, PLAINTIFF BANK ENTITLED ONLY TO THE UNPAID INSTALLMENTS WHICH ACCRUED DURING THE SIX YEARS PRIOR TO COMMENCING THE ACTION.

The Fourth Department, reversing Supreme Court, determined the bank which purportedly accelerated the debt was not a holder or assignee of the mortgage and did not own or hold the note. Therefore the debt was not accelerated. Plaintiff bank was entitled to the unpaid installments which accrued during the 6-year (and 90 day) period before the action was commenced: "Where, as here, a mortgage is payable in installments, separate causes of action accrue for each unpaid installment, and the six-year statute of limitations begins to run on the date that each installment becomes due... . If, however, the mortgage holder accelerates the entire debt by a demand, the six-year statute of limitations begins to run on the entire debt... . Here, defendants' own submissions in support of the motion establish that, although another entity purported to accelerate defendants' entire debt in 2010 and 2012, that entity was not the holder or assignee of the mortgage and did not hold or own the note. Thus, the entity's purported attempts to accelerate the entire debt were a nullity, and the six-year statute of limitations did not begin to run on the entire debt ... . Although this mortgage foreclosure action therefore is not time-barred, we note that, 'in the event that the plaintiff prevails in this action, its recovery is limited to only those unpaid installments which accrued within the six-year [and 90-day] period immediately preceding its commencement of this action' ...". ***Wilmington Sav. Fund Socy., FSB v. Gustafson*, 2018 N.Y. Slip Op. 02954, Fourth Dept 5-27-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

ALTHOUGH THERE WERE NO GUARD RAILS ON THE SCAFFOLD, PLAINTIFF DID NOT TIE OFF HIS HARNESS AND LANYARD, QUESTION OF FACT WHETHER PLAINTIFF'S CONDUCT WAS THE SOLE PROXIMATE CAUSE OF HIS INJURY FROM A FALL, SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION PROPERLY DENIED.

The Fourth Department determined there was a question of fact whether plaintiff's conduct (not tying off a safety harness) was the sole proximate cause of his injuries from a fall. Therefore his motion for summary judgment on his Labor Law § 240(1) cause of action was properly denied: "Defendants had engaged claimant's employer to sandblast and repaint the overpass. In order to perform the work, a truck known as a V-Deck was parked underneath the overpass. The truck had wings that fold out to provide a platform for the blasters, and aluminum scaffolding was erected on the wings of the truck. The scaffolding had no guardrail. Claimant was, however, provided with safety equipment, including a safety harness with a six-foot lanyard. While blasting one evening, plaintiff fell 15 feet to the pavement. His safety harness was not tied off. ... [C]laimant acknowledged that he had a safety harness with a six-foot lanyard, that he had previously used it on the same job, and that he 'probably' could have tied it off to the cross-bracing prior to his fall. Indeed, claimant correctly concedes on this appeal that there is an issue of fact whether adequate tie-off points were available. Furthermore, claimant testified that, if he had tied his six-foot lanyard off to the cross-bracing, he 'wouldn't have fallen' 15 feet to the pavement." ***Weitzel v. State of New York*, 2018 N.Y. Slip Op. 02946, Fourth Dept 4-27-18**

MEDICAL MALPRACTICE, CIVIL PROCEDURE, PERSONAL INJURY.

MOTION TO SET ASIDE THE VERDICT IN THIS MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN GRANTED, THE JURY REASONABLY FOUND THE DOCTOR'S NEGLIGENCE WAS NOT A PROXIMATE CAUSE OF PLAINTIFF'S INJURIES.

The Fourth Department, reversing Supreme Court, determined that plaintiff's motion to set aside the verdict in this medical malpractice case should not have been granted. The jury found that the doctor's postsurgical negligence (ordering an MRI of plaintiff's hand rather than her wrist) was not a substantial factor in causing plaintiff's injuries: "... [W]e conclude that the issues of negligence and proximate cause were not so inextricably interwoven as to make it logically impossible to find one without the other... . Where a verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view ... , and we conclude that defendants are entitled to that presumption here. We also agree with defendants that the verdict was not against the weight of the evidence and that the court therefore erred in granting plaintiff's posttrial motion. It is well settled that a jury verdict will be set aside as against the weight of the evidence only when the evidence at trial so preponderated in favor of the movant that the verdict could not have been reached on any fair interpretation of the evidence ... . Applying that principle here, we conclude that there is a fair interpretation of the evidence pursuant to which the jury could have found that, notwithstanding the error in ordering the incorrect MRI, defendant did not cause any postsurgery injuries alleged by plaintiff ... . We further conclude that the 'trial was a prototypical battle of the experts, and the jury's acceptance of defendants' case was a rational and fair interpretation of the evidence'...". ***Capierseo v. Tomaino*, 2018 N.Y. Slip Op. 02917, Fourth Dept 4-27-18**

MEDICAL MALPRACTICE, CIVIL PROCEDURE, PERSONAL INJURY.

CONTINUOUS TREATMENT DOCTRINE RENDERED THE MEDICAL MALPRACTICE ACTION TIMELY, SUPREME COURT REVERSED.

The Fourth Department, reversing Supreme Court, determined that the cause of action for medical malpractice stemming from an office visit within the limitations period was independently viable, and the continuous treatment doctrine rendered all the causes of action timely: "... [T]he claims based on allegations of negligent treatment during the January 2, 2013 office visit have an independent viability regardless of whether any prior alleged negligence is time-barred. ... [T]he record establishes that defendants provided continuous treatment to plaintiff for a condition, i.e., atrial fibrillation, until January 2, 2013; the alleged wrongful acts or omissions were related to that condition; and such treatment 'gave rise to the . . . act, omission or failure' complained of ... . Indeed, the record establishes that the alleged wrongful acts or omissions themselves ran continuously until January 2, 2013. We therefore reject defendants' contention that the statute of limitations began to run at the time of the first prescription of Pradaxa on January 10, 2011. We conclude that the court erred in granting the motion inasmuch as this action was timely commenced within 2½ years of the cessation of defendants' continuous treatment of plaintiff's atrial fibrillation condition ...". ***Phillips v. Buffalo Heart Group, LLP*, 2018 N.Y. Slip Op. 03055, Fourth Dept 4-27-18**

MEDICAL MALPRACTICE, CIVIL PROCEDURE, EVIDENCE, PERSONAL INJURY.

CREDIBILITY ISSUES ARE FOR THE JURY, PLAINTIFF'S VERDICT SHOULD NOT HAVE BEEN SET ASIDE BASED UPON THE JUDGE'S FINDING DEFENDANT DOCTOR'S TESTIMONY CREDIBLE IN THIS MEDICAL MALPRACTICE, WRONGFUL DEATH CASE.

The Fourth Department, reversing Supreme Court, determined defendant's motion to set aside the verdict in this medical malpractice, wrongful death case should not have been granted. Decedent was suffering from a life-threatening but eminently treatable condition (unstable angina) when he saw the defendant doctor. Decedent died three days later. The doctor testified decedent had refused to go to the hospital. Credibility issues were raised about the substance of the defendant's testimony. The Fourth Department noted that credibility issues are for the jury and should not be considered on a motion to set aside a verdict: "Defendant testified at trial that he recognized the life-threatening condition and conveyed to decedent 'that he should go to the hospital' … . Defendant further testified that he knew that 'there needed to be more testing done,' but that decedent 'adamant[ly]' 'refused' to go to the hospital and 'didn't give [defendant] a good reason why.' Defendant's notes, however, do not reflect any urgency. Indeed, the only notation made by defendant concerning that conversation was, 'Discussed admit on Fri of holiday [weekend], declined.' Moreover, despite the fact that defendant claimed to have recognized the severity of decedent's condition, he did not set up any follow-up appointment with a cardiologist for over five days and admitted that he was 'surprised' to learn of decedent's death three days after his appointment with decedent. … Here, the only direct testimony regarding whether defendant recognized the severity of decedent's condition and explained that to him 'came from defendant . . . and, implicit in the court's findings is that his testimony was credible. Issues of credibility, however, are for the jury' ... . We agree with plaintiff that there are issues with respect to defendant's credibility, and those issues should not have been determined by the court. In our view, this is not a case in which there is 'absolutely no showing of facts from which negligence may be inferred' ... , and we thus conclude that the court erred in granting defendant's motion for a directed verdict." ***Bolin v. Goodman*, 2018 N.Y. Slip Op. 02920, Fourth Dept 4-27-18**

PERSONAL INJURY.

QUESTION OF FACT WHETHER DEFENDANTS UNREASONABLY INCREASED THE RISK IN THIS HORSEBACK-RIDING-LESSON ACCIDENT CASE.

The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment in this horseback-riding-lesson accident should not have been granted. Plaintiffs' expert raised questions of fact whether defendants unreasonably increased the risk of riding: "The expert opined that defendant unreasonably increased the risks of horseback riding by numerous acts and omissions, including selecting an inappropriate horse for a novice rider such as plaintiff; providing an unsafe riding space that had ground poles; and failing, prior to bringing the horse to a trot, to ensure that plaintiff knew how to control the horse's speed and dismount in the event of an emergency. Thus, even assuming, arguendo, that defendants met their burden of establishing their entitlement to judgment as a matter of law... , we conclude that plaintiffs raised an issue of fact whether defendants unreasonably increased the risks of horseback riding ...". ***Enos-Groff v. Schumacher*, 2018 N.Y. Slip Op. 02960, Fourth Dept 4-27-18**

PERSONAL INJURY, CIVIL PROCEDURE.

DEFENDANT DRIVER RAISED A QUESTION OF FACT WHETHER THE CAUSE OF THE ACCIDENT WAS BLACK ICE, PLAINTIFF PASSENGER'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED, DEFENDANT'S MOTION TO AMEND THE PLEADINGS TO ADD THE EMERGENCY DOCTRINE DEFENSE SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiff passenger's motion for summary judgment against defendant driver should not have been granted and defendant's motion to amend the pleadings to add the emergency doctrine defense should have been granted. Defendant lost control of the car but raised an issue of fact whether the cause of the accident was black ice: "... [P]laintiff submitted evidence establishing that defendant lost control of the vehicle. The burden then shifted to defendant, who came forward with the exculpatory explanation that he encountered black ice on the roadway, which constituted an emergency. When the evidence is viewed in the light most favorable to defendant ... , there is a triable issue of fact whether there was black ice and thus whether an emergency existed at the time of the accident. * * * ... [T]he court erred in denying that part of defendant's cross motion for leave to amend the answer to assert an emergency doctrine defense. Motions for leave to amend pleadings should be freely granted in the absence of prejudice, and '[m]ere lateness is not a barrier' ... . The fact that defendant's request was made nine days after the filing of the note of issue does not render the request untimely ... . Indeed, '[w]here no prejudice is shown, the amendment may be allowed during or even after trial' ... , and here, the record is devoid of any potential prejudice flowing from the proposed amendment." ***Greco v. Grande*, 2018 N.Y. Slip Op. 02916, Fourth Dept 4-27-18**

PERSONAL INJURY, CONTRACT LAW.

QUESTION OF FACT WHETHER SNOW PLOWING CONTRACTOR LAUNCHED AN INSTRUMENT OF HARM OR CREATED OR EXACERBATED A DANGEROUS CONDITION IN THIS ICE AND SNOW SLIP AND FALL CASE.

The Fourth Department, in a comprehensive decision not fully summarized here, determined there was had a question of fact whether the snow removal contractor (SWBG) had launched an instrument of harm or created or exacerbated a dangerous condition by piling snow near where plaintiff slipped and fell: "With respect to the third-party action, we agree with defendants that the court erred in granting SWBG's motion insofar as it sought dismissal of the contribution cause of action. It is undisputed that SWBG entered into a contract with the Church to provide snowplowing services, which included salting or sanding the plowed areas at the discretion of SWBG. There are 'three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his [or her] duties, launche[s] a force or instrument of harm' . . . (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties . . . and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely' ... . In their verified bill of particulars, defendants relied solely on the first situation. With respect to the first situation, although SWBG piled the snow in the area of the incline, SWBG established that it did so only at the Church's direction. Even assuming, arguendo, that such evidence is sufficient to establish that SWBG did not launch a force or instrument of harm, we conclude that defendants raised a triable issue of fact whether SWBG piled the snow at that location on its own initiative and thus whether SWBG launched a force or instrument of harm, i.e., created or exacerbated a dangerous condition ...". ***Chamberlain v. Church of the Holy Family*, 2018 N.Y. Slip Op. 02949, Fourth Dept 4-27-18**

REAL PROPERTY.

DOCUMENT ALLOWING ACCESS TO PLAINTIFF'S LAND OVER DEFENDANT'S LAND DID NOT INCLUDE ANY WORDS OF PERMANENCY, THE DOCUMENT CREATED A REVOCABLE LICENSE NOT AN EASEMENT.

The Fourth Department, reversing Supreme Court, determined the filed document which described a right to access plaintiff's land over defendant's land did not include any language indicating access was to be granted permanently. Therefore the document created a license which defendant had revoked: "The law is well settled that '[a]n easement appurtenant is created when such easement is (1) conveyed in writing, (2) subscribed by the person creating the easement and (3) burdens the servient estate for the benefit of the dominant estate' ... . Although no specific words are required to express the permanency of an easement ... , to 'create an easement by express grant there must be a writing containing plain and direct language evincing the grantor's intent to create a right in the nature of an easement rather than a revocable license . . . The writing must establish unequivocally the grantor's intent to give for all time to come a use of the servient estate to the dominant estate. The policy of the law favoring unrestricted use of realty requires that where there is any ambiguity as to the permanence of the restriction to be imposed on the servient estate, the right of use should be deemed a license, revocable at will by the grantor, rather than an easement'... . Here, the document signed by the parties' predecessors in interest contains no words of permanency, nor any indication that it is meant to bind the grantor's successors in interest. Thus, we conclude that plaintiff failed to establish that the parties' predecessors intended to create an easement ...". ***New York Land Dev. Corp. v. Bennett*, 2018 N.Y. Slip Op. 02926, Fourth Dept 4-27-18**

REAL PROPERTY.

PRIVATE NUISANCE CAUSE OF ACTION BASED UPON LIGHTS AND NOISE FROM A STADIUM PROPERLY SURVIVED SUMMARY JUDGMENT.

The Fourth Department determined the private nuisance cause of action properly survived summary judgment: "The elements of a cause of action for private nuisance are '(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct' ... . The issue whether a defendant's use of land constitutes a private nuisance generally turns on questions of fact that include the degree of interference and the reasonableness of the use under the circumstances ... . Evidence of noise and other disturbances has been found sufficient to preclude an award of summary judgment dismissing a cause of action for private nuisance ... . We conclude that defendant's own submissions raised issues of fact precluding summary judgment ... . Defendant submitted plaintiffs' deposition testimony, which established that the stadium has lights and a loudspeaker that they find disturbing. When there are events at the stadium, the lights and loudspeaker are used late into the evening, sometimes until 11:00 p.m. The lights shine directly into the home of one of the plaintiffs. In addition, spectators at those events make a disturbing amount of noise, and also stand near plaintiffs' property lines drinking alcohol and throwing trash onto plaintiffs' properties. We further conclude, in any event, that plaintiffs raised issues of fact in opposition to the motion... . Plaintiffs submitted the deposition testimony of defendant's superintendent, who testified that defendant had intended to plant trees along the property lines to mitigate any interference with plaintiffs' use of the property but had abandoned that plan. The

superintendent also acknowledged that he understood why plaintiffs had concerns about defendant's use of the property." ***Ranney v. Tonawanda City Sch. Dist.*, 2018 N.Y. Slip Op. 03004, Fourth Dept 4-27-18**

WORKERS' COMPENSATION LAW, CORPORATION LAW.

DEFENDANT PROPERTY OWNER WAS THE ALTER EGO OF PLAINTIFF'S EMPLOYER, PLAINTIFF'S ONLY REMEDY FOR INJURY FROM A FALL WAS UNDER THE WORKERS' COMPENSATION LAW.

The Fourth Department determined defendant property owner was the alto ego of plaintiff's employer (Fox Run) and therefore plaintiff's only remedy for his on the job injury was under the Workers' Compensation Law. Plaintiff worked on a farm and was injured when he fell from a hayloft: "... [W]e conclude that defendant established as a matter of law that it was the alter ego of Fox Run. Defendant and Fox Run were single-member-owned LLCs that were created on the same day 'for a single purpose[,] to operate a horse stable business' ... . Both defendant and Fox Run had the same individual owner ... , and shared the same insurance policy ... . Defendant had '[n]o separate set of [financial] books' and 'no separate accounting or tax reporting'... . In addition, defendant had no employees ... and 'was formed solely for the purpose of owning the premises upon which plaintiff's employer . . . operate[d]' its horse farm ... . Fox Run leased property from no one other than defendant, there was no written lease agreement, and Fox Run did not pay any rent to defendant ... . Finally, Fox Run's owner paid defendant's property taxes as well as the operating expenses of the property ...". ***Buchwald v. 1307 Porterville Rd., LLC, 2018 N.Y. Slip Op. 03006, Fourth Dept 4-27-18**

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